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In the Supreme Court of the United States

OCTOBER TERM, 1992

SALVADOR GODINEZ, WARDEN, PETITIONER

v.

RICHARD ALLAN MORAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the state court applied an incorrect standard of competence when it permitted respondent to plead guilty and waive his right to the assistance of counsel.

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INTEREST OF THE UNITED STATES

The issue in this case is whether a court's determination of a defendant's competence to waive the assistance of counsel and to plead guilty to a criminal charge is governed by a more stringent standard than the determination of the defendant's competence to stand trial. This issue has arisen in federal as well as state criminal cases. The United States therefore has a law enforcement interest in the outcome of this case.

STATEMENT

1. In the early morning hours of August 2, 1984, respondent and a companion entered the Red Pearl

Saloon in Carson City, Nevada, and fatally shot the bartender and a customer. Respondent then instructed his companion to help him take money from the premises. Pet. App. B3, C5-C6.

Nine days later, respondent entered the apartment of his former wife and fatally shot her. He then shot himself in the abdomen and attempted unsuccessfully to slit his wrists. When the police arrived at the scene, respondent claimed that intruders were responsible for the carnage. Two days later, however, he summoned the police to his hospital room and confessed to all three murders. Pet. App. C6-C8.

2. Respondent was charged with three counts of first-degree murder and other crimes. Respondent pleaded not guilty to the charges, and the court ordered him to be examined by two psychiatrists. After their examinations, the psychiatrists concluded that respondent was legally competent. Pet. App. D6, A24-A28.[1]

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[1] Dr. William D. O'Gorman found that respondent had a "normal personality" and was "quite factual and open," although he appeared depressed about his conduct and expressed "a desire to accept capital punishment." O'Gorman Report 2-3. Based on his examination, Dr. O'Gorman expressed the opinion that respondent was "knowledgeable of the charges being made against him. He can assist his attorney, in his own defense, if he so desires. He is fully cognizant of the penalties if convicted." *Id.* at 3.

Dr. Jack A. Jurasky described respondent as coherent; he observed that respondent's capacity to pay attention and to concentrate was good and that his judgment was "within normal limits." Jurasky Report 2. He described respondent's mood as "depressed but appropriate" and stated that "[t]here is not the slightest doubt in my mind" that respondent was "in full control of his faculties insofar as his ability to aid counsel, assist in his own defense, recall evidence and to give

After being informed that the State would seek the death penalty, respondent advised the court that he wanted to discharge his attorneys, waive the right to the assistance of counsel, and plead guilty to all three murders. 11/28/84 Tr. 2, 3-4. Based on the psychiatrists' reports, the trial court concluded that respondent "is competent in that he knew the nature and quality of his acts, * * * understands the nature of the criminal charges against him and is able to assist in his defense of such charges, or against the pronouncement of the judgment thereafter." *Id.* at 3-4. The court further found that respondent was aware of "the consequences of entering a plea of guilty to the charges" and that he could "intelligently and knowingly waive his constitutional right to assistance of an attorney." *Id.* at 4.

The court advised respondent of his right to counsel, enumerated the dangers and disadvantages of self-representation, and inquired into respondent's understanding of the proceedings and the consequences of waiving counsel. 11/28/84 Tr. 4-11. Respondent acknowledged that he had discussed with his attorneys the charges against him and possible defenses to those charges. *Id.* at 9. When asked why he wished to waive counsel, respondent explained: "I don't want them to present any mitigating evidence

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testimony if called upon to do so." *Id.* at 2-3. Dr. Jurasky concluded (*id.* at 3):

> Psychologically, and perhaps legally speaking, this man, because he is expressing and feeling considerable remorse and guilt, may be inclined to exert less effort towards his own defense but I do not feel that it is necessarily a major consideration. It is the story of an ordinarily law-abiding intelligent member of society who became involved with alcohol and drugs to such an extent that he lost his wife, his job, and placed his entire future in serious jeopardy.

[at the death penalty phase]. I don't want this presented, and * * * they feel that they have to." *Id.* at 11. When the court asked if respondent was then under the influence of any drug or alcohol, respondent replied that he was on medication.[2] *Id.* at 12. The court then discharged respondent's attorney and accepted his waiver of counsel. *Id.* at 12-13.

The court allowed respondent to withdraw his pleas of not guilty and to enter guilty pleas. 11/28/84 Tr. 14-16. After conducting a lengthy inquiry, *id.* at 16-36, the court determined that respondent was not pleading guilty in response to threats or promises; that he understood the nature of the charges against him and the consequences of pleading guilty, including the possibility that he would receive the death penalty; that he was aware of the rights he was relinquishing; and that he acknowledged the factual basis for the pleas.

At a subsequent hearing, the court advised respondent that it was "unwise" of him to waive his right to counsel and afforded him the opportunity to withdraw his guilty pleas. 12/17/84 Tr. 2. Respondent stated that he did not wish to reconsider either his waiver of counsel or his guilty pleas and that he did not want to present any witnesses in his behalf at the death penalty phase. *Id.* at 2-3.

At the sentencing hearing before a three-judge panel on January 21, 1985, respondent declined to cross-examine the State's witnesses or to present any mitigating evidence on his own behalf. 1/21/85 Tr. 161, 162. The court sentenced respondent to death on each of the three murder charges. *Id.* at 165, 166. On

[2] Although respondent did not tell the court which medications he was taking, those medications were inderal, dilantin, phenobarbitol, and vistaril, which had been prescribed to control cocaine-induced seizures. See Pet. App. A14 n.4, D4.

appeal, the Supreme Court of Nevada affirmed respondent's death sentences for the two saloon murders, but reversed the death sentence for the murder of his former wife and remanded the case to the trial court for resentencing. Pet. App. C1-C16.

3. Four months later, respondent sought post-conviction relief in state court, arguing for the first time that his guilty pleas "were involuntarily entered" because he was under the influence of medication and was incompetent to waive counsel and represent himself. Pet. App. D2-D3, D6-D7. After an evidentiary hearing at which respondent testified, the state court rejected his claim. *Id.* at D1-D12. The court found that respondent was "thoroughly canvassed" by the trial court, that he knowingly and voluntarily waived his right to counsel, and that "he fully understood the proceedings," *id.* at D5-D6. The court upheld the trial court's finding of competence, noting that the two psychiatrists who had examined respondent had found him competent. *Id.* at D6, D8. With respect to respondent's claim concerning the medication he was taking at the time he entered his guilty pleas, the court observed that the trial court was aware that respondent was taking medication, and it noted that at the evidentiary hearing respondent did not present any evidence to suggest that the medication had affected his mental capacity. *Id.* at D8.

Respondent took an appeal to the Supreme Court of Nevada, which denied relief. Pet. App. E1-E7. The court found that the trial court had adequately questioned respondent concerning "his understanding of the possible consequences of a guilty plea, the voluntariness of the plea, the elements of the charged crimes, the possible punishments, and his rights at trial and during the penalty phase." *Id.* at E6. The

court further observed that "nothing in the record of the canvass in any way suggests that [respondent] was unable to comprehend what was going on," or that the trial court needed to inquire further into the effect of the medication respondent was taking. *Ibid.* The court explained that respondent "presented no medical evidence in the post-conviction hearing which necessarily established that the medication influenced him to such an extent that he was unable to understand the meaning and consequences of his plea." *Id.* at E6-E7.

4. In 1989, respondent filed a petition for a writ of habeas corpus in federal district court, claiming that he was incompetent to plead guilty or to waive counsel. The court concluded that respondent's guilty pleas were voluntarily entered, Pet. App. B13, and that his waiver of counsel was knowing and intelligent, *id.* at B18. The court noted that respondent had failed to present any evidence to show that the medications he was taking at the time of his guilty pleas deprived him of the capacity "to freely and voluntarily decide for himself that he wanted to ignore the advice of his appointed counsel and change his plea to guilty." *Id.* at B13. The court further observed that "the record does not reflect that the judge, the prosecutor, or the two attorneys initially appointed to represent [respondent] felt that his mental faculties were impaired because of the medications he had consumed." *Id.* at B13-B14.

5. The court of appeals reversed. Pet. App. A1-A28. The court first held that the state court should have conducted a hearing "to evaluate and determine [respondent's] competency to waive constitutional rights before it accepted [his] decision to discharge counsel and change his pleas." *Id.* at A15. Relying

on previous Ninth Circuit decisions, the court of appeals stated that "[c]ompetency to waive constitutional rights requires a higher level of mental functioning than that required to stand trial." *Id.* at A19. A defendant is competent to waive constitutional rights, the court explained, only if he has the capacity for "reasoned choice" among the alternatives available to him, whereas he is competent to stand trial if he has "a rational and factual understanding of the proceedings and is capable of assisting his counsel." *Ibid.*

The court of appeals concluded that "the state court erroneously applied the standard for evaluating competency to stand trial, instead of the correct 'reasoned choice' standard." Pet. App. A20. The two psychiatrists' evaluations, the court explained, "cannot support a finding that [respondent] was mentally capable of the reasoned choice required for a valid waiver of constitutional rights." *Id.* at A24. The court noted that the evaluations were "couched in terms relevant to [respondent's] competency to stand trial * * * [and] sa[id] nothing pertinent to [his] capacity for a reasoned choice among alternatives," *id.* at A28; that they failed to address the effect of the medication, *id.* at A27-A28; and that one of them was based on an examination that occurred several months before the guilty plea proceeding, *id.* at A25. Accordingly, the court of appeals concluded that "the postconviction order issued by the state court does not constitute a valid finding that in November 1984 [respondent] was competent when he discharged his counsel and changed his pleas to guilty." *Id.* at A23. The court therefore directed that the writ of habeas corpus issue unless the State allowed respondent to withdraw his guilty pleas and proceed to trial with the assistance of counsel. *Id.* at A28.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Dusky* v. *United States*, 362 U.S. 402 (1960) (per curiam), this Court held that due process prohibits a court from trying a defendant unless he has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "a rational as well as factual understanding of the proceedings against him." In *Drope* v. *Missouri*, 420 U.S. 162, 171 (1975), the Court applied the same standard in a state case, describing the test as whether the defendant possesses the capacity "to consult with counsel, and to assist in preparing his defense." See also *Medina* v. *California*, 112 S. Ct. 2572, 2579 (1992); *Pate* v. *Robinson*, 383 U.S. 375, 388 (1966) (Harlan, J., dissenting). That test is now universally applied in determining whether a defendant is competent to stand trial. See Gerald Bennett, *A Guided Tour Through Selected ABA Standards Relating to Incompetence to Stand Trial*, 53 Geo. Wash. L. Rev. 375, 376-379 (1985).

The court of appeals held that the traditional *Dusky* standard does not apply in determining whether a defendant is competent to plead guilty or to waive his right to counsel. Instead, the court held, the proper standard for those decisions, as well as for the waiver of other constitutional rights, is whether the defendant has the capacity for "reasoned choice" among the alternatives available to him—a standard that the court described as more stringent than the one for determining competence to stand trial.

This Court should not follow the Ninth Circuit's invitation to create multiple tests for competence in the criminal trial setting. A decision that a defendant is competent to stand trial should establish that he is competent to participate fully in his trial by making

each of the various decisions that he may be called upon to make in the course of his defense. To hold that a defendant is competent to be tried but incompetent to perform the tasks essential to the conduct of his defense would deprive the defendant of some of the very choices that the Constitution was designed to protect. Competence should be established by a single standard under which the court must determine whether the defendant has the mental capacity to understand the proceedings and participate in the trial. After finding the defendant competent, the court may still decline to accept his guilty plea or waiver of counsel, but that decision should be made under the "knowing and intelligent waiver" standard that is applied whenever a defendant seeks to waive his rights to go to trial and to be represented by counsel.

The state court properly permitted respondent to waive his right to counsel and enter pleas of guilty. Based on the reports of the two psychiatrists who examined respondent, the court found respondent competent under the traditional *Dusky* standard. In addition, the court found that respondent acted knowingly and intelligently in seeking to waive counsel and to plead guilty to the murder charges against him. The court's careful inquiries support its conclusion that respondent was competent and that his waivers were constitutionally valid.

ARGUMENT

THE STATE COURT DID NOT APPLY AN INCORRECT STANDARD OF COMPETENCE IN PERMITTING RESPONDENT TO PLEAD GUILTY AND TO WAIVE HIS RIGHT TO THE ASSISTANCE OF COUNSEL

A. A Finding That A Defendant Is Competent To Stand Trial Establishes That He Is Competent To Enter A Plea Of Guilty And To Waive The Right To Counsel

A defendant's competence to stand trial is measured by his ability to understand the proceedings against him and to perform particular tasks necessary to assisting in his defense. See, *e.g.*, Peter Silten and Richard Tullis, *Mental Competency in Criminal Proceedings*, 28 Hastings L.J. 1053, 1060 (1977) ("the narrow purpose of the *Dusky* test is to determine the effect, if any, that a defendant's mental impairment can be expected to have on his ability to function adequately during trial"); *ABA Criminal Justice Mental Health Standards* § 7-4.1 (Commentary), at 171 (1989) (determination of competence under the *Dusky* formulation involves "an evaluation of a particular defendant's skills").

If a defendant is competent to stand trial under that standard, he is also competent to waive counsel and to enter a guilty plea. That is because the mental abilities needed to make decisions concerning the conduct of one's defense are the same as those needed to make decisions about whether to plead guilty or waive counsel. The decision whether to plead guilty or not guilty and the decision whether to be represented by counsel or to proceed pro se are perhaps the two most basic decisions that a defendant must make in the course of conducting his defense.

Thus, in order to satisfy the traditional "understand and assist" test of competence to stand trial, a defendant must at least possess the kind of decisionmaking capacity that is needed to make fundamental choices such as whether to plead guilty and whether to accept the assistance of counsel.

The Ninth Circuit's dual standard for competence is particularly unjustified in the case of guilty pleas or waivers of counsel, because there is already in place a body of law designed to ensure that those important decisions are made voluntarily, with an appreciation of their significance and consequences. In *Boykin* v. *Alabama*, 395 U.S. 238, 244 (1969), the Court imposed an affirmative duty on trial judges to conduct an on-the-record examination of a defendant who seeks to plead guilty in order to ascertain that he "has a full understanding of what the plea connotes and of its consequence[s]." In the federal system, that requirement is codified in Fed. R. Crim P. 11(c), which provides that before accepting a plea of guilty the district court must determine that the defendant understands (1) the nature of the charges and the potential sentence to which he is subject; (2) that he has a right to be represented by counsel at every stage of the proceedings; (3) that he has a right to plead not guilty, the right to be tried by a jury, the right against compelled self-incrimination, and the right to confront and cross-examine the witnesses against him; and (4) that if the guilty plea is accepted there will not be a further trial of any kind.

Similarly, the Court has imposed on trial courts an affirmative duty to determine that a waiver of counsel is "intelligently and understandingly" made. *Carnley* v. *Cochran*, 369 U.S. 506, 513 (1962). See

also *Faretta* v. *California*, 422 U.S. 806, 835 (1975); *Johnson* v. *Zerbst*, 304 U.S. 458, 465 (1938). The defendant must be "made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with his eyes open.'" *Faretta*, 422 U.S. at 835, quoting *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 279 (1942).

Accordingly, in every case in which a defendant pleads guilty or waives counsel, the trial court is compelled to go beyond the question of the defendant's capacity to comprehend what he is doing and to make a determination that he has an actual understanding of the nature and consequences of his choice. The determination that a defendant understands the nature and consequences of waiving his rights necessarily implies that he is competent to do so. See *Chapman* v. *United States*, 553 F.2d 886, 892 n.10 (5th Cir. 1977) (suggesting that the question whether a defendant is competent to waive counsel may be "wholly encompassed within the *Johnson* v. *Zerbst* test"); see also *United States* v. *Clark*, 943 F.2d 775, 780 (7th Cir. 1991) petition for cert. pending, No. 92-6439 (filed Oct. 30, 1992); *United States* v. *McDowell*, 814 F.2d 245, 250 (6th Cir.), cert. denied, 484 U.S. 980 (1987); *United States ex rel. McGough* v. *Hewitt*, 528 F.2d 339, 342 n.2 (3d Cir. 1975). There is thus no need for a separate determination of a defendant's competence to waive counsel and plead guilty in a case such as this one, where the trial court determined that the defendant was competent to stand trial under the *Dusky* standard and that he knowingly and understandingly waived his rights.

1. Even apart from the requirement that a court find a defendant's guilty plea to be voluntary and

intelligent, there is no sound reason why a defendant who has been adjudged competent to stand trial should not be deemed competent to enter a guilty plea. Implicit in a court's finding that a defendant is competent to stand trial is the conclusion that he is competent to decide to plead not guilty and to take the risks involved in following that strategy.[3] Of course, because a decision to stand trial is a decision not to plead guilty, the level of competence required to decide to stand trial should logically be the same as that required to decide whether to enter a guilty plea. In each case, the defendant must consider the same potential risks and benefits. With respect to each decision, the defendant is called upon to appreciate the strength of the government's case, to review the available defenses, and to assess the likely penalties upon conviction.

To be sure, the decision to plead guilty is a profound one, with more certain and immediate consequences than the decision to proceed to trial. That does not mean, however, that the decision to plead guilty is more difficult, requiring a higher level of competence. To the contrary, entering a plea of guilty may entail significantly fewer complications than participating in the conduct of a trial. A defendant at trial faces a number of decisions concerning trial strategy and tactics that, although not individually as momentous

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[3] A defendant's ability to decide how to plead has been identified as an important criterion for determining his competence to stand trial. See Ames Robey, *Criteria for Competency to Stand Trial: A Checklist for Psychiatrists*, 122 Am. J. Psychiatry 616, 618 (1965); Laboratory of Community Psychiatry, Harvard Medical School, Final Report, *Competency To Stand Trial and Mental Illness* 99-103, 106 (1973); Bennett, *supra*, 53 Geo. Wash. L. Rev. at 377 nn.11, 12.

as the decision to plead guilty, are at least as complex, and may be compounded over a period of days or weeks. With the assistance of counsel, a defendant at trial must decide whether to put on a defense, whether to raise an affirmative defense, which witnesses to call, how to challenge the government's case, and—ordinarily most difficult of all—whether to testify in his own behalf. If a defendant is competent to make each of those decisions, it is difficult to understand why he is not equally competent to make the single decision to plead guilty.

Consistent with this analysis, every federal circuit that has addressed the issue, except the Ninth and District of Columbia Circuits,[4] has concluded that the degree of competence required to plead guilty is the same as that required to stand trial, and that a separate competency finding is not required before the defendant is permitted to plead guilty. See *United States* v. *Simmons*, 961 F.2d 183, 187 (11th Cir. 1992); *White Hawk* v. *Solem*, 693 F.2d 825, 829-830 n.7 (8th Cir. 1982), cert. denied, 460 U.S. 1054 (1983); *United States ex rel. Heral* v. *Franzen*, 667 F.2d 633, 637-638 (7th Cir. 1981); *Allard* v. *Helgemoe*, 572 F.2d 1, 4-5 (1st Cir.), cert. denied, 439 U.S. 858 (1978); *United States ex rel. McGough* v. *Hewitt*, 528 F.2d at 342 n.2; *Malinauskas* v. *United States*, 505 F.2d 649, 652-654 (5th Cir. 1974); *United States* v. *Harlan*, 480 F.2d 515, 517 (6th Cir.), cert. denied, 414 U.S. 1006 (1973); *Wolf* v. *United States*, 430 F.2d 443 (10th Cir. 1970); *United States* v. *Valentino*, 283 F.2d 634 (2d Cir. 1960). Those

[4] See *United States* v. *Masthers*, 539 F.2d 721, 726 (D.C. Cir. 1976); *Sieling* v. *Eyman*, 478 F.2d 211, 215 (9th Cir. 1973).

courts have recognized that the degree of competence needed to satisfy the *Dusky* "understand and assist" test is sufficient to satisfy constitutional concerns by ensuring that the defendant has the capacity to understand the meaning of pleading guilty and the consequences of doing so.

2. Similar analysis applies to a defendant's decision to waive the assistance of counsel. Competence to make that decision should not be tested by a more stringent standard than competence to stand trial, because the decision to waive counsel is no more demanding than other decisions to forgo constitutional rights that a defendant may be called upon to make in the course of the proceedings against him. Those decisions can include whether to demand a jury trial, whether to testify, and whether to dismiss or replace an attorney once the proceedings are under way.

It has been suggested that competence to waive counsel should be measured by a "vaguely higher" standard than competence to stand trial, because representing oneself in any further proceedings requires greater powers of comprehension, judgment, and reason than a defendant needs to stand trial with the aid of an attorney. See, *e.g.*, *United States ex rel. Konigsberg* v. *Vincent*, 526 F.2d 131, 133 (2d Cir. 1975), cert. denied, 426 U.S. 937 (1976); *United States* v. *McDowell*, 814 F.2d at 250; *Blackmon* v. *Armontrout*, 875 F.2d 164 (8th Cir.), cert. denied, 493 U.S. 939 (1989); see also Silten and Tullis, *supra*, 28 Hastings L.J. at 1073 (The higher standard of mental competence to waive counsel is required "not because of the waiver decision itself but because the trial court's acceptance of the defendant's waiver of counsel must include the finding that the defendant is competent to act as his own counsel.").

The premise of the argument that it should be more difficult for defendants to waive counsel is faulty. As this case illustrates, a defendant's choice to forgo counsel's advice does not necessarily entail his active self-representation during trial. Respondent did not intend to represent himself at trial, but intended to plead guilty. Thus, even assuming that the ability to conduct a defense at trial requires some higher level of functioning than the ability to provide meaningful assistance to counsel, the higher standard would have no application in a case such as this one, in which the defendant intends to plead guilty rather than contest his guilt at trial, and in which he does not intend to contest the State's showing at the penalty stage.

Even when an accused waives the right to counsel for the purpose of actively representing himself, he should not be held to a higher standard of mental competence than a defendant who proceeds to trial with counsel's assistance. In *Faretta* v. *California*, 422 U.S. 806 (1975), the Court did not explicitly address the level of competence required for a defendant to waive counsel; the Court, however, declined to condition the validity of such a waiver on the trial court's assessment of the defendant's ability to conduct his own defense. Rather, in according independent constitutional standing to the right of self-representation, the Court recognized that an accused who manages his own defense "relinquishes * * * many of the traditional benefits associated with the right to counsel." *Id.* at 835. In formulating a standard for a valid waiver of counsel, the Court focused not on the defendant's ability to act as his own lawyer, but on the safeguards that must surround the process of deciding whether to forgo counsel, holding

that the court's only duty is to ensure that the decision is "knowing and intelligent." *Ibid.*, citing *Johnson* v. *Zerbst*, 304 U.S. at 464-465.

Because *Faretta* does not base the validity of the waiver on the ability of the defendant adequately to represent himself, application of a "heightened" standard of competence to the waiver decision cannot be justified by a concern for the quality of the defendant's self-representation. Under *Faretta*, the use of such a standard would place an unnecessary—and arguably impermissible—burden on a defendant's right to represent himself.

This conclusion comports with the historical roots of the *Dusky* competence rule. The requirement that a defendant have the mental capacity to stand trial arose at a time when a defendant did not have a right to counsel. Since it was contemplated that the defendant would often be conducting his own defense, see *Betts* v. *Brady*, 316 U.S. 455, 464-467 (1942), it was held that he could not be brought to trial if he lacked the mental capacity to understand the proceedings and defend himself. As Blackstone explained, "if, after he has pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defence?" 4 W. Blackstone, *Commentaries* *24; see also *Yountsey* v. *United States*, 97 F. 937, 940-942 (6th Cir. 1989). As the court stated in *People* v. *Reason*, 334 N.E.2d 572, 574 (N.Y. 1975), in light of the historical origins of the rule against trying an incompetent defendant "it would be difficult to say that a standard which was designed to determine whether a defendant was capable of defending himself, is inadequate when he chooses to conduct his own defense."

3. Not only would adoption of the different standards of competence formulated by the Ninth Circuit be at odds with historical understanding, but it would

lead to perverse results, and in some cases could actually work to the detriment of the defendant. A defendant who was found competent to stand trial but not competent to plead guilty might be denied the opportunity available to other defendants to obtain leniency through plea bargaining. See *United States ex rel. Heral* v. *Franzen*, 667 F.2d at 638; *Allard* v. *Helgemoe*, 572 F.2d at 4; *Sharp* v. *Scully*, 509 F. Supp. 493, 495 (S.D.N.Y. 1981). "Such a result, in the name of constitutional protection, would be anomalous to say the least." *Franzen*, 667 F.2d at 638.

The court of appeals held that a defendant found incompetent under the "reasoned choice" standard not only could not plead guilty, but also could not waive other constitutional rights. Yet to deprive the defendant of the ability to waive rights such as the right to a jury trial, the right to confront witnesses, and the right to testify on the ground that he does not have the capacity to make a "reasoned choice" with respect to the waiver decision could seriously handicap the conduct of his defense. For example, a defendant who was found incompetent to waive his right to a jury trial would presumably be denied the right to request a bench trial, even though he might benefit from pursuing that course. And the case of a defendant found incompetent to make a "reasoned choice" regarding whether to testify would present an especially vexing problem: because a defendant has both a constitutional right to testify and a constitutional right to remain silent,[5] he is required to waive one or the other right regardless of which course he

[5] See *Rock* v. *Arkansas*, 483 U.S. 44, 51-53 (1987); *Hoffman* v. *United States*, 341 U.S. 479, 485-486 (1951).

takes. Strict adherence to the Ninth Circuit's dual competency standard thus could result in a court's not being able to proceed at all, even though it had found the defendant competent to stand trial.

4. The mischief of the Ninth Circuit's "reasoned choice" standard for guilty pleas and waivers of constitutional rights is compounded by the practical difficulties of applying that test. The Ninth Circuit described that standard as more stringent than *Dusky*, but did not shed light on how it would work in practice. And it is difficult to discern how the capacity to make a "reasoned choice" to waive a constitutional right differs from the ability to attain a "rational understanding" of the proceedings and to consult with and assist an attorney. See *United States* v. *Clark*, 943 F.2d at 780 (distinction between two standards is "very difficult to ascertain"); *United States ex rel. Heral* v. *Franzen*, 667 F.2d at 637 ("How these two standards differ as a practical matter is far from clear."); *Sharp* v. *Scully*, 509 F. Supp. at 495 (adoption of "different and higher standard of mental competency for pleading guilty than for proceeding to trial" would force psychiatrists and judges "to draw lines that are in fact too fine to be determined").

The practical difficulties are particularly apparent with respect to the application of the Ninth Circuit's standard to waivers of counsel, where even the courts that have adopted the Ninth Circuit's test have conceded that it is ill-defined. See *United States* v. *McDowell*, 814 F.2d at 250 (degree of competence necessary to waive counsel is "vaguely higher" than that required to stand trial); *United States ex rel. Konigsberg* v. *Vincent*, 526 F.2d at 133 (same). Indeed, even respondent regards the difference as

more a matter of "terminology" than substance. Br. in Opp. 4. If that is so, it is hard to find any justification in the principles of due process for the creation of a new category of competence, the main effect of which will be to make trial procedure more complicated and to create a new ground for courts to fall into constitutional error.

5. None of this Court's decisions supports the Ninth Circuit's creation of a separate competency test for pleading guilty. With respect to the creation of a separate test for waiving counsel, two of this Court's decisions appear to provide support for the Ninth Circuit's ruling. On close examination, however, those decisions do not compel affirmance of the Ninth Circuit's decision, even on the issue of the standard to be applied to waivers of counsel.

In *Massey* v. *Moore*, 348 U.S. 105 (1954), the defendant was convicted in state court and sentenced to life imprisonment after a trial at which he was not represented by an attorney and made no attempt to conduct a defense. He sought federal collateral relief on the ground that, in light of his mental condition, he should have been provided with counsel at trial. The lower courts denied relief, holding that the defendant had not demonstrated that it violated due process to try him without counsel. This Court remanded for a hearing to determine whether the defendant was competent to be tried without counsel. 348 U.S. at 108-109. In the course of its brief discussion of the point, the Court stated that "[o]ne might not be insane in the sense of being incapable of standing trial and yet lack the capacity to stand trial without benefit of counsel." *Id.* at 108.

In context, it appears that the Court's statement was not meant to create multiple competency stand-

ards, but to establish that, in determining whether it violated due process to deny counsel to a defendant, it was not enough to show that the defendant was minimally competent to stand trial. In the years before this Court's decision in *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), the question whether the denial of counsel violated due process was decided on a case-by-case basis; a violation was declared if the Court found "special circumstances" in a particular case requiring counsel in order to ensure the fairness of the proceedings. See *Gideon* v. *Wainwright*, 372 U.S. at 349-351 (Harlan, J., concurring). The holding of *Massey* is that the State may not deny counsel to an indigent defendant if, in light of the defendant's mental condition, the appointment of counsel was necessary to ensure a fair trial. That is a very different proposition, however, from the one embraced by the Ninth Circuit: that a defendant who satisfies the *Dusky* test for competence to stand trial may nonetheless be incompetent to waive his right to counsel after he has been afforded that right.

The second case that bears on the standard of competence for waiving the right to counsel is *Westbrook* v. *Arizona*, 384 U.S. 150 (1966) (per curiam). In *Westbrook*, the trial court found the defendant competent to stand trial on the basis of an examination by three psychiatrists. At the beginning of his trial, and apparently without any further inquiry by the court, the defendant discharged his attorneys and proceeded to represent himself. See *State* v. *Westbrook*, 406 P.2d 388, 390-393 (Ariz. 1965). In a brief per curiam opinion, this Court vacated the defendant's conviction and remanded, stating that "[a]lthough petitioner received a hearing on the issue of his competence to stand trial, there appears

to have been no hearing or inquiry into the issue of his competence to waive his constitutional right to the assistance of counsel and proceed, as he did, to conduct his own defense." 384 U.S. at 150. The Court then cited *Johnson* v. *Zerbst*, *supra*, and *Carnley* v. *Cochran*, *supra*, for the proposition that trial courts have a responsibility to ascertain that any waiver of counsel is "intelligent and competent." 384 U.S. at 150.

Although the decision in *Westbrook* is "ambiguous," *United States ex rel. McGough* v. *Hewitt*, 528 F.2d at 342 n.2, it should not be taken to establish that a defendant's competence to waive the right to counsel is subject to a stricter test than the one set forth in *Dusky*. The Court in *Westbrook* did not suggest that a different standard for competence was to be employed on remand, and in fact the Court's use of the term "competence" in connection with the waiver of counsel appears to have been a shorthand reference to the *Johnson* v. *Zerbst* standard for determining the validity of the waiver. The Court's principal concern seems to have been with the state court's failure to inquire whether the defendant was sufficiently aware of the right he was relinquishing and the consequences of doing so, since there was no record of any inquiry into these matters. See *People* v. *Reason*, 334 N.E.2d at 575 (the *Westbrook* Court was "more concerned about the fact that there was nothing in the record to indicate that the trial court had queried the defendant in accordance with *Johnson* v. *Zerbst* * * * to determine whether his waiver of counsel was intelligently made").[6]

[6] To the extent that *Westbrook* could be read to suggest that a defendant may not waive the assistance of counsel without satisfying a "higher" standard of competency, it is questionable whether that decision survives *Faretta* v. *California*, *supra*, where the Court for the first time recognized a constitutional right of self-representation and held that a court may not refuse to accept a waiver of the right to counsel on the ground that the waiver is improvident. In any event, *Westbrook* by its terms applies only to a defendant who waives counsel and "proceed[s] * * * to conduct his own defense." 384 U.S. at 150. See *Splitt* v. *United States*, 364 F.2d 594, 598 (6th Cir. 1966), cert. denied, 385 U.S. 1019 (1967) (*Westbrook* has no relevance to the situation in which a defendant waives counsel and pleads guilty); *United States* v. *Clark*, 943 F.2d at 780. Thus, *Westbrook* would, at most, require a court to conduct a separate inquiry into a defendant's ability to act as his own lawyer—an inquiry that would be unnecessary in this case, in which respondent pleaded guilty and declined to participate in further proceedings.

The Ninth Circuit has previously relied on this Court's decision in *Rees* v. *Peyton*, 384 U.S. 312 (1966), to support its adoption of the "reasoned choice" competency standard. *Sieling* v. *Eyman*, 478 F.2d 211, 215 n.2 (9th Cir. 1973). That case, however, provides no support for the Ninth Circuit's rule. In *Rees*, the defendant's attorney expressed doubt about his client's competence to make the decision to withdraw a petition to this Court to review his state conviction. This Court directed the district court to determine whether the defendant had the "capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation." 384 U.S. at 314.

The Court in *Rees* did not suggest that the defendant's capacity to make a "rational choice" to abandon his petition involved a greater degree of competence than would be necessary for him to stand trial; the Court appeared instead simply to be adapting the

Dusky competency test to the circumstances of that case. As we have noted, an individual's ability to choose among options is, in practice, one of the criteria that determines whether a person meets the "understand and assist" test for competence.

In sum, nothing in the principles of due process or any of this Court's cases requires that trial courts reassess a defendant's competence when he seeks to plead guilty or waive his right to counsel. The *Dusky* standard, supplemented by the traditional protections against involuntary and unknowing waivers of the right to counsel and the right to trial, is sufficient to ensure that the proceedings against the defendant are not fundamentally unfair.

B. The State Court Correctly Determined That Respondent's Guilty Plea Was Valid And That He Knowingly And Voluntarily Waived His Right To Counsel

Based on its consideration of the psychiatrists' reports, the state trial court concluded that respondent "understands the nature of the criminal charges against him" and "is able to assist in his defense." 11/28/84 Tr. 3. Because the court recognized that the issue for decision was not primarily respondent's competence to stand trial, but his capacity to enter a valid guilty plea and waive his right to counsel, the court went on to address those questions directly: it concluded that respondent "knows the consequences of entering a plea of guilty" and that he "can intelligently and knowingly waive his constitutional right to assistance of an attorney." *Id.* at 3-4.[7] With

[7] Both the psychiatrists and the state court made findings that respondent satisfied the elements of the "understand and assist" test. However, the court never explicitly stated, in so many words, that respondent was competent to stand trial. Rather, the court directly addressed his competence to plead guilty and to waive counsel. This is not to say, however, that if the court had actually pronounced respondent competent to stand trial, it would have been required separately to consider the issue of competence to plead guilty or to waive constitutional rights, or to make explicit findings with respect to the capacity to make those decisions. Rather, a valid finding of competence to stand trial should suffice as a matter of law to establish competence to make the other decisions as well. Thus, although a court must also satisfy itself that a guilty plea or waiver is knowing and voluntary, "[n]o additional competency determination need be made." *United States* v. *Clark*, 943 F.2d at 782; *United States ex rel. McGough* v. *Hewitt*, 528 at 342 n.2; see also *People* v. *Reason*, 334 N.E.2d at 575 (a determination that a waiver of counsel was "knowing and intelligent," coupled with "the finding that the defendant was mentally competent to stand trial, is sufficient to show that the trial court properly allowed the defendant to represent himself").

respect to the guilty plea, the court ascertained that respondent had "a full understanding of what the [guilty] plea connotes and of its consequence[s]." *Boykin* v. *Alabama*, 395 U.S. at 244. Likewise, the court adequately discharged its responsibility to determine that the waiver of counsel was voluntary and knowing. It conducted a lengthy colloquy with respondent in which it explained in detail the nature of the proceedings and ascertained that respondent understood "the dangers and disadvantages of self-representation" and the consequences of his choice. *Faretta* v. *California*, 422 U.S. at 835.

Nothing in the court's colloquy with respondent gave it reason to doubt that respondent's plea and his decision to forgo counsel were voluntary, knowing, and intelligent. Likewise, there was no reason

for the court to question respondent's competence to make those decisions. Respondent offered a plausible explanation for his desire to waive counsel, see 11/28/84 Tr. 11, and he was able to conduct a coherent discussion with the court on the question whether he committed the murders deliberately and with premeditation. *Id.* at 30-31. The evidence that respondent understood the nature and consequences of his waivers provided support for the conclusion that he was competent to proceed. See *United States* v. *Clark*, 943 F.2d at 781; *United States* v. *McDowell*, 814 F.2d at 250; *Chapman* v. *United States*, 553 F.2d at 892 n.10.

Respondent challenges the court's determination of competence on the ground that the physicians' reports failed to analyze the effect of his drug and alcohol abuse, his recent suicide attempt, and the seizure medication he was taking at the time of his guilty plea hearing. Br. in Opp. 9-10. Respondent also questions whether there was adequate consideration of respondent's "remorse and depression" and its effect on his ability "rationally to forego the protection of a trial and representation by counsel." *Id.* at 10.

Contrary to respondent's contention, the psychiatrists' reports addressed at length the possible effects of his prior drug and alcohol abuse. One of the psychiatrists specifically noted that although respondent's drug history may have selectively impaired his memory, it had not affected his judgment, his concentration, or his cognitive abilities generally. Jurasky Report at 2-3. The psychiatrists also took note of respondent's recent suicide attempt and commented on his "sad and moderately depressed" mood and his expressions of remorse for his crimes. *Ibid.*; see also O'Gorman Report at 3. Neither psychiatrist, however, viewed respondent's response to his situation as inappropriate or indicative of mental derangement or disorder, nor did either regard respondent's decisionmaking ability as impaired.

Respondent's willingness to accept the punishment of death was not, as respondent suggests, definitive evidence of his incompetence or mental disability. While the great majority of defendants seek to avoid or mitigate any punishment for their offenses, it is not proof of mental impairment that a defendant decides to accept the punishment society has prescribed for his conduct.[*] Finally, respondent's guilty plea and waiver of counsel are not rendered invalid by the court's failure to inquire into the effects of the medications that were prescribed for him. The court had the opportunity to observe respondent after being informed that he was on medication, and it found nothing in his demeanor or behavior to indicate that the drugs were having an adverse effect. Nor has respondent ever pointed to any evidence that the medication he was taking affected his competence. Under these circumstances, the state courts properly declined

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[*] As the Chief Justice has stated in a related context, see *Lenhard* v. *Wolff*, 443 U.S. 1306, 1312-1313 (1979) (Rehnquist, Circuit Justice):

> The idea that the deliberate decision of one under sentence of death to abandon possible additional legal avenues of attack on that sentence cannot be a rational decision, regardless of its motive, suggests that the preservation of one's own life at whatever cost is the *summum bonum*, a proposition with respect to which the greatest philosophers and theologians have not agreed and with respect to which the United States Constitution by its terms does not speak.

to require the state trial court to conduct any further inquiry into the possibility that the medications were impairing respondent's judgment.

Respondent also implies (see Br. in Opp. 10) that the *Dusky* "understand and assist" test is inadequate to establish competence to make the weighty decisions at issue in this case, because it fails to take account of a defendant's emotional state as it might undermine his ability to appreciate his peril or weaken his desire to vindicate his own interests. Although the "understand and assist" test does not expressly mandate examination of the "volitional" or "affective" aspects of a defendant's capacity to participate in the trial process, those elements are inherently part of the assessment of a defendant's competence to stand trial. A person who is unable to advance his own interests or act effectively in his own behalf—whether as a result of anxiety, depression, or other mental condition—is incompetent under the traditional *Dusky* test because he is incapable of assisting in his own defense.[9] By the same token, a finding that a defend-

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[9] See, *e.g.*, A. Louis McGarry, *Competency for Trial and Due Process via the State Hospital*, 122 Am. J. Psychiatry 623, 628 (1965) (noting the importance of taking into account the defendant's affect and "degree of volition" in evaluating competence); Robey, *supra*, 122 Am. J. Psychiatry at 618 (checklist for competence includes assessment for "suicidal depression" and "regressive withdrawal" manifested, among other things, by accused's emotional indifference to his fate); Ronald Roesch and Stephen Golding, *Competency to Stand Trial* 59 (1980) (describing competency screening test that takes note of "self-defeating behavior" or mood disorders that "might interfere with participation in the defense"); *id.* at 64 (describing alternative protocol for evaluating competence that is designed to assess "an accused's ability to

ant is competent to stand trial, as was made here, can be taken to establish, at a minimum, that he is capable of rationally assessing and pursuing his own interests.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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cope with the trial process in an adequately self-protective fashion"); Bennett, *supra*, 53 Geo. Wash. L. Rev. at 378 & n.18 (Harvard Medical School Laboratory of Community Psychiatry's recommended criteria for competence to stand trial includes evaluation of defendant's "self-defeating versus self-serving motivation" as it relates to his desire "to adequately protect himself and appropriately utilize legal safeguards to this end").

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